Michigan Manufacturers Association
Position on the
Federal Enforceability of
Michigan's Rule 901
January 1998

I. INTRODUCTION

Rule 901, MAC R336.1901, Michigan's rule for regulating air pollution nuisances, is not federally enforceable under the Clean Air Act ("CAA"), 42 U.S.C. 7401 et. seq.[1] Neither Rule 901 nor its predecessor, Rule 46, was ever approved as part of the Michigan State Implementation Plan ("SIP"). In accordance with the CAA and U.S. Environmental Protection Agency ("EPA") internal policy, only rules pertaining to the attainment and maintenance of the National Ambient Air Quality Standards ("NAAQS") for criteria pollutants can lawfully be approved as part of a SIP. Rule 901 is a narrative standard applicable to nuisances, and is not relevant to the attainment or maintenance of the NAAQS. Therefore, Rule 901 was neither approved as part of the Michigan SIP, nor was it eligible, as a nuisance provision, for such approval.

The evidence supporting this position is compelling, and was recently affirmed by the Federal District Court for the Eastern District of Michigan in Charter Township of Van Buren v. EQ, Case No. 97-60076-AAQ (January 5, 1998) In that case, Judge Hackett held that Rule 901 was not a part of the Michigan SIP and, thus, could not be used as the basis for a citizen suit enforcement action under the CAA. See Attachment 1.

The remainder of this memorandum describes in detail the factual and legal basis for the conclusion that Rule 901 is not federally enforceable under the CAA.

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[1]Throughout this document, reference to Rule 901 includes reference to both subparts (a) and (b) of the Rule Even though in recent time subpart (a) is sometimes referred to as the "public health" portion of Rule 901, and subpart (b) the "public nuisance" portion, the whole of the Rule constitutes a nuisance standard. Public nuisance is defined under law to include not only unreasonable interference with the comfortable enjoyment of life and property, but also to include interference with the "public's health, safety, morals, peace, comfort, or convenience." Cloverleaf Car Co v Phillips Petroleum Co, 213 Mich App 186 (1995) (plaintiff seeking damages for groundwater contamination). (Emphasis added.) Accord 4 Restatement Torts, 2d § 821B.

II. BACKGROUND

Michigan's program for air pollution control preceded federal CAA requirements by more than three years. Michigan's rules for air pollution control, including its original nuisance rule, Rule 46, became effective on August 15, 1967. Federal requirements for air pollution control did not come into effect until after the enactment of the CAA in 1970.

Under the 1970 CAA, EPA was charged with developing a list of air pollutants having an adverse effect on public health or welfare. EPA was charged with establishing primary and secondary NAAQS for each such pollutant.[2] The CAA then required states to develop plans for achieving and maintaining these NAAQS. The CAA required that these plans, known as SIPs, be reviewed and approved by EPA.[3] Once approved, a SIP becomes federally enforceable under the CAA.

As a result of the 1970 CAA, Michigan submitted its first SIP proposal to EPA on February 3, 1972. This submittal, entitled "Implementation Plan for the Control of Suspended Particulates, Sulfur Oxides, Carbon Monoxide, Hydrocarbons, Nitrogen Oxides, and Photochemical Oxidants in the State of Michigan" consisted of a letter of transmittal, a narrative description of Michigan's plan to attain and maintain the NAAQS, and a copy of the State's air pollution control rules.[4]

As noted above, included in Michigan's rules at that time was Rule 46. This nuisance provision prohibited emissions of air contaminants which, *inter alia*, caused discomfort to any person. In a Federal Register notice published on May 31, 1972, EPA partially approved Michigan's plan "for the attainment and maintenance of the National Standards."[5] Rule 46 was never mentioned nor cited in the partial approval notice.

Rule 46 was substantively changed in 1979 as a result of a Michigan Court of Appeals case wherein the court held that language similar to that contained in Rule 46 was unconstitutionally void for vagueness. People v. Olsonite, 80 Mich. App. 763, 265 N.W.2d 176 (1978). In an attempt to adhere to the recommendations contained in the Olsonite opinion, Michigan's nuisance rule was revised so as to address "unreasonable interferences" with the comfortable enjoyment of life and property. See State of Michigan Air Quality Implementation Plan, Revisions May 1, 1979, p. 9-5.

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[2]The primary standards were to be set at a level to protect public health and the secondary standards were aimed at protecting public welfare. 42 U.S.C. § 7409. The pollutants for which NAAQS have been established include particulates, sulfur oxides, nitrogen dioxide, carbon monoxide, ozone and lead.

[3]42 U.S.C. § 7410.

[4]37 Fed. Reg. 10873 (May 31, 1972).

[5]37 Fed. Reg. 10873 (May 31, 1972).

In addition to this language change for Rule 46, Michigan also revised other existing air pollution rules and added new provisions specifically intended to meet the NAAQS and other requirements of the 1977 Amendments to the CAA. Before these new and modified rules were approved by the Michigan Air Pollution Control Commission ("MAPCC"), they were also recodified. The new nuisance provision was codified as Rule 901 and the old provision, Rule 46, was rescinded pursuant to state law.[6]

Throughout its regulatory history, Rule 901 has been relied upon by State regulators primarily to abate odor nuisances. The Rule restates in narrative terms the common law doctrine of nuisance and, consequently, contains no numerical emission limits or standards. As such, Rule 901, as with its predecessor Rule 46, has never been viewed as a component of Michigan's control strategy for the attainment and maintenance of the NAAQS for criteria pollutants.

III. RULE 901 WAS NEVER ADOPTED NOR PREVIOUSLY INTERPRETED TO BE PART OF THE MICHIGAN SIP

While still in the proposal stage, Michigan submitted its revised rules package to EPA for review on April 25, 1979. EPA later published a notice of proposed rulemaking describing Michigan's submittal and specifying areas EPA deemed deficient or that needed clarification or correction.[7] On October 12, 1979, Michigan submitted a response to the proposed rulemaking, including commitments to meet the specified requirements of the CAA. Subsequently, MAPCC revised its proposed rules package and adopted substantial revisions to the State's air pollution control program, effective January 18, 1980.

The State's rules for air pollution control, including the new and revised rules for meeting the air quality nonattainment requirements of Part D, were submitted to EPA on January 9, 1980. In a May 6, 1980 Federal Register notice EPA approved some of the rules, conditionally approved or disapproved other rules, and took no action on other portions of Michigan's submittal. Rule 901 was neither approved nor conditionally approved in this

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[6]The Michigan Air Pollution Control Rules "Blue Book" dated 3/96, states:

> On January 3, 1980, the Air Pollution Control Commission filed amendments with the Secretary of State which became effective on January 18, 1980, rescinding the old rules (R 336.11 through R 336.79, R 336.101 through R 336.116, and R 336.141 through R 336.147) and adding the following rules to replace and amend the rescinded rules:
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> | R336.1101-R336.1128 | R336.1201-R336.1285 | R336.1301-R336.1357 |
> | R336.1401-R336.1404 | R336.1501-R336.1507 | R336.1601-R336.1618 |
> | R336.1701-R336.1710 | R336.1901-R336.1930 | R336.2001-R336.2033 |
> | R336.2101-R336.2199 | R336.2301-R336.2308 | R336.2601-R336.2608 |
> | R336.2701-R336.2706 | | |

[7]44 Fed. Reg. 47350 (August 13, 1979).

rulemaking. In fact, Rule 901 was never mentioned or cited in the May 6, 1980 preamble or rulemaking. Therefore, no action was taken on Rule 901 by EPA on May 6, 1980.

A. May 6, 1980 Rulemaking Did Not Approve Rule 901 As A Part Of Michigan's SIP

The May 6, 1980 final rule regarding the Part D requirements of Michigan's SIP was a very narrow and limited rulemaking. It was limited to addressing Michigan's plan for implementing the Part D requirements of the CAA as amended in 1977.[8] In this rulemaking, EPA took action only on rules which had "not been previously approved by EPA and on which Michigan is relying as part of its control strategy for nonattainment areas." See Attachment 2.[9]

1. The Preamble Limited The Scope Of The Rulemaking To The Control Strategy For Nonattainment Areas

The preamble for the May 6, 1980 Federal Register notice specifically limited the rulemaking to those rules which had "not been previously approved by EPA and on which Michigan is relying as part of its control strategy for nonattainment areas."[10] The preamble went on to state:

> The rules which are not part of Michigan's control strategy for nonattainment areas and which have not been previously approved by USEPA will be addressed in a separate notice of proposed rulemaking.[11]

Since Rule 901 was not related to the State's "control strategy for nonattainment," it was not approved as part of the SIP by the May 6. 1980 rulemaking. Instead, according to the preamble, EPA apparently intended to address Rule 901 (and any other rules which were not a part of Michigan's control strategy for nonattainment areas) in a separate rulemaking. No such "separate" rulemaking approving Rule 901 has ever occurred.

The conclusion that Rule 901 was not approved as part of the SIP is supported by the preamble's summary of the actions taken by EPA on Michigan's submittal. Specifically, the preamble summarized the provisions which were "Approved" as: (a) Maintenance/Malfunction provisions; (b) New Source Review regulations; (c) Carbon Monoxide control strategy for the Saginaw area; (d) Hydrocarbon RACT rules contained in the MAPCC Rules, Part 6, with the

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[8]Part D of the 1977 CAA required State SIPS be revised to demonstrate the attainment of the primary NAAQS by December 31, 1982, or, in certain circumstances, by December 31, 1987 for ozone and/or carbon monoxide 45 Fed. Reg. 29790 at 29791, 1st column, (May 6, 1980).

[9]45 Fed. Reg. 29790 at 29791 (May 6, 1980).

[10]45 Fed. Reg. 29790 at 29791 (May 6, 1980).

[11]45 Fed. Reg. 29790 at 29791 (May 6, 1980).

exception of Rules 336.1603 and 1606; and (e) total suspended particulate study schedules for secondary nonattainment areas.[12]

The preamble also summarized the rules which were "Conditionally Approved." Those rules were listed as: (a) Hydrocarbon RACT rules R336.1603 and 1606; and (b) total suspended particulate control strategy for primary and secondary nonattainment areas which do not include iron and steel sources.[13]

As a generally applicable nuisance standard, Rule 901 was not related to any of the aforementioned provisions. In fact, as previously noted, Rule 901 is not mentioned or cited in the preamble. The preamble confirms that EPA took no action on Rule 901. In interpreting the scope of a regulation, courts look to, and give deference to, a regulation's preamble. United States v. Eastern of New Jersey, Inc., 34 Env't Rptr Cases 1115 (D. N.J. 1991); and Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887 (9th Cir. 1986). Even the Michigan Department of Environmental Quality ("MDEQ"), during a review of Michigan SIP requirements, concluded that " action" was taken on Rule 901 in the May 6, 1980 Federal Register notice. See Attachment 3.

2. The Rulemaking Specifically Excluded Rule 901 From Approval As Part Of The SIP

The May 6, 1980 EPA rulemaking specifically excluded Rule 901 from Michigan's SIP. In the May 6, 1980 Federal Register notice, 40 C.F.R. § 52.1170(c)(18) read at the time, as follows:

> (18) On January 9, 1980, the State submitted a copy of the finally adopted rules of the commission. These rules became fully effective January 18, 1980. All the rules submitted are approved except those identified in paragraph (16) on which no action has been taken at this time.[14]

Paragraph 16, 40 C.F.R. § 52.1170(c)(16), excluded Rule 901 from the SIP approval. Specifically, the last sentence of paragraph 16 stated: "In addition USEPA is taking no action on the State's control strategy for the attainment of carbon monoxide in the City of Detroit; the transportation control plans, the requirement of vehicle inspection and maintenance, and general requirements which are not Part D requirements."[15]

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[12]45 Fed. Reg. 29790 at 29792 (May 6, 1980).

[13]45 Fed. Reg. 29790 at 29792 (May 6, 1980).

[14]45 Fed. Reg. 29790 at 29801 (May 6, 1980).

[15]45 Fed. Reg. 29790 at 29801 (May 6, 1980).

Part D of the CAA addresses nonattainment requirements. Rule 901 is a nuisance standard unrelated to attainment or maintenance of any NAAQS or to the requirements of Part D. Therefore, consistent with the language of 40 C.F.R. § 52.1170(c)(16) and (18), EPA took no action on Rule 901, and the Rule was not approved as part of the SIP on May 6, 1980.

3. Rule 901 Was Not A "Previously Approved Rule"

The preamble to the May 6, 1980 rulemaking indicates that many of Michigan's rules which were adopted on January 18, 1980, were similar to proposed rules previously submitted to EPA on April 25, 1979. Since some of the rules had apparently been previously submitted and approved by EPA, EPA stated that they "would take no action on the rules already approved by USEPA." Instead, EPA merely acknowledged the "recodification" of those rules.[16]

Rule 901 does not fit into the category of previously approved rules. For Rule 901 to constitute a "previously approved rule," Rule 901's predecessor, Rule 46, would have to have been previously approved as part of the SIP, and Rule 901 would have to have been substantively identical to Rule 46. However, Rule 901 is not substantively identical to Rule 46. Instead, Rule 901 was intentionally drafted to be materially different from Rule 46 to overcome the "void for vagueness" constitutional defense discussed in Olsonite.

Finally, Rule 46 was never approved as a part of Michigan's SIP. Michigan's original SIP submittal was made on February 3, 1972. This submittal was entitled "Implementation Plan for the Control of Suspended Particulates, Sulfur Oxides, Carbon Monoxide, Hydrocarbons, Nitrogen Oxides, and Photochemical Oxidants in the State of Michigan." 37 Fed. Reg. 10873 (May 31, 1972). The package that was submitted to EPA included of all of Michigan's rules, as well as a narrative description of air quality in Michigan and the State's plan for controlling air pollution. In this submittal, Rule 46 is not identified as a component of Michigan's control strategy for attainment and maintenance of the NAAQS.

In its partial approval notice, EPA made clear it was approving the SIP (as well as other state SIPs) for purposes of implementing, maintaining and enforcing the NAAQS. 37 Fed. Reg. 10842 (May 31, 1972). Specifically, EPA stated that "all portions of State plans which related to attainment and maintenance of national standards are approved unless specifically disapproved herein." 37 Fed. Reg. 10842 (May 31, 1972). Moreover, § 52.1172 entitled "Approval Status", states, in part, "the Administrator approves Michigan's plan for the attainment and maintenance of the national standards." 37 Fed. Reg. 10842 (May 31, 1972). See Attachment 4. It follows, then, that EPA would not have approved Rule 46 -- a non-numerical rule primarily used by Michigan to address odor nuisances, and clearly not intended to advance the attainment and maintenance goals of the CAA. Neither odor nor other nuisance provisions are mentioned in the final approval notice. Consequently, EPA never approved Rule 46 for general nuisance or odor control purposes.

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[16]45 Fed. Reg. 29790 at 29791 (May 6, 1980).

B. EPA Policy Consistently Has Rejected Nuisance Provisions As Part Of SIPs

1. EPA's Office Of General Counsel Consistently Advised The Regions That Non-Criteria Pollutant Controls Are Not Legally Part Of The SIP

EPA's Office of General Counsel has interpreted the CAA as prohibiting the federal government from approving state rules which are unrelated to the attainment or maintenance of the NAAQS.[17] Specifically, in a memorandum dated February 9, 1979, Michael James of EPA's Office of General Counsel stated:

> OGC has always advised the Regions that measures to control non-criteria pollutants may not legally be made part of a SIP. Section 110 of the Clean Air Act makes clear that the SIPs have this limitation. This limited scope seems to be pretty well understood and only rarely does a Regional Office include a non-criteria pollutant measure in a SIP approval proposal.
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> I mention this now because as States submit their major SIP revisions to meet the new requirements of Part D and other provisions of the 1977 Amendments, they may not always differentiate between their regulations to control criteria pollutants and their air pollution control regulations in general. The Regional Office should differentiate if the State does not. The usual practice is that the Region notes in the proposed approval/disapproval preamble that EPA is not taking any action on an identified non-criteria pollutant measure because it cannot legally be part of the SIP.[18] (emphasis added). See Attachment 5.

2. In Keeping With Agency Policy, EPA Region V Would Have Not Approved Either Rule 46 Or Rule 901 As Part Of Michigan's SIP.

By not specifically approving or even mentioning Rule 46 or Rule 901 in any SIP rulemaking, EPA was acting consistent with its own policy to not approve odor or other nuisance provisions as part of SIPs. This policy has been clearly expressed in numerous rulemakings on SIPs. For example, in a May 25, 1982 final rulemaking on the Iowa SIP, EPA recognized that states generally submit all rules and rule revisions when making SIP submittals.[19] See Attachment 6. In this instance, Iowa had revised numerous rules including some regarding

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[17]Memorandum from Michael James, Associate General Counsel of EPA's Air, Noise, and Radiation Division, to Regional Counsels and Air Branch Chief regarding "Status of State/Local Air Pollution Control Measures not related to NAAQS," Dated February 9, 1979.

[18]Id.

[19]47 Fed. Reg. 22531 (May 25, 1982).

"odorous substances" and "odor complaints and violations."[20] These rules were included in the package submitted to EPA as a SIP revision. EPA correctly addressed these rules as outside the scope of the CAA, and took no action on them. Specifically, with respect to these odor provisions, EPA stated:

> These revisions deal with the control of odor for which EPA has not adopted standards and does not require control. These revisions are unavoidably included with the SIP revisions but are not submitted by the state as part of the state plan and EPA does not take any action on them.[21]

This is identical to Michigan's situation. Although Rule 901 was submitted as a part of Michigan's rule package, it was not a part of the State's program to attain or maintain the NAAQs. In fact, the rulemaking docket does not include any document in which the MDEQ asserts that Rule 901 is an integral part of Michigan's control strategy for the attainment and maintenance of the NAAQS. Instead, Rule 901, which was specifically developed to address odor and other nuisance problems, was submitted to EPA "unavoidably", or for ease of effort, along with other rules explicitly intended to be included as SIP revisions.

In a similar situation regarding Pennsylvania's odor emission regulations, EPA stated:

> In reviewing SIPs, EPA is governed by the criteria in Section 110(a)(2) of the Clean Air Act, which require measures for the attainment and maintenance of the primary and secondary NAAQs. In order for EPA to properly approve a state rule as part of the SIP, the rule must have a significant relationship to attainment and maintenance of a NAAQs"[22] (emphasis added). See Attachment 7.

Michigan's Rule 901 was not -- and is not -- pertinent to the attainment and maintenance of the NAAQs. Instead, Rule 901 addresses nuisance emissions such as odors. Therefore, Rule 901 should not, and could not, have been approved under the CAA. Similarly, with respect to Pennsylvania's odor regulation, EPA stated that "EPA believes that the state odor regulations bear no significant relationship to the attainment and maintenance of any NAAQs. In general, EPA believes that there is no direct or indirect relationship between the state odor regulations [cited in the Federal Register notice] and any criteria pollutant."[23]

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[20]47 Fed. Reg. 22531 (May 25, 1982).

[21]47 Fed. Reg. 225531 (May 25, 1982).

[22]50 Fed. Reg. 32451 (August 12, 1995).

[23]50 Fed. Reg. 32451 (August 12, 1995).

C. EPA Region V Has Consistently And Publicly Stated That Rule 901 Is Not Enforceable By EPA

Until very recently, EPA Region V consistently has asserted that Rule 901 is not in the Michigan SIP and was not federally enforceable.

1. EPA Region V's Former Regional Administrator Consistently And Publicly Stated That Rule 901 Is Not Enforceable

Numerous letters from former EPA Regional Administrator for EPA Region V, Valdas Adamkus, clearly and unequivocally stated that EPA does not have the authority to enforce Rule 901. For example, in a letter dated March 18, 1987, Regional Administrator Adamkus notified a citizen of the State of Michigan that a facility could meet the requirements of the New Source Performance Standards, but still have odorous emissions. The Regional Administrator went on to state: "If that is the case, EPA will look to the MDNR [now the MDEQ] to resolve the . . . problem under the Michigan Air Pollution Control Act rule for general nuisance (a rule not enforceable by U.S. EPA)"[24] (emphasis added). See Attachment 8. Similarly, in a letter to United States Senator Carl Levin, dated October 26, 1988, Regional Administrator Adamkus stated "In our correspondence last winter, we advised you that odor violations are not federally enforceable . . .".[25] See Attachment 9.

In short, EPA's own interpretation of the May 6, 1980 rulemaking consistently has been that Rule 901 is not federally enforceable. This point was forcefully made as recently as September 20, 1994 when Mr. Gary Gulezian, Chief of the EPA Region V Air Toxics and Radiation Branch, responded to a FOIA request regarding the status of Michigan's SIP. In response to the FOIA request, Mr. Gulezian identified all of the Michigan rules "considered to be federally enforceable." Rule 901 is conspicuous in its absence. See Attachment 10.

2. EPA Consistently Has Issued Federal Register Notices Stating That Odor and Other Nuisance Provisions Are Not Federally Enforceable

In the past, EPA's position has consistently been that the Agency does not have the authority under the CAA to adopt nuisance provisions as part of a SIP. EPA has publicly stated this position numerous times in Federal Register notices on the approval of various State Implementation Plans. They have even taken this position explicitly in the approval notice for a Michigan SIP revision. In particular, in the 1993 final rulemaking adopting Wayne County's 1985 Ordinance as a SIP revision, EPA took no action on Section 802 of the Ordinance because it dealt with the regulation and control of odors. EPA stated: "USEPA is not taking action on this Section [802] at this time because the Clean Air Act does not contain provisions for the

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[24]Letter from V. Adamkus to K. Peterson dated March 18, 1987.

[25]Letter from V. Adamkus to C. Levin dated October 25, 1988.

regulation of odor and there are no National Ambient Air Quality Standards which regulate odor"[26] (emphasis added). See Attachment 11.

Similarly, in a 1995 direct final rule regarding revisions to Montana's SIP, EPA stated: "EPA believes it has no legal basis in the Act for approving the State's odor control rule . . . and making it federally enforceable because odor control provisions are not generally related to attainment or maintenance of the NAAQS"[27] (emphasis added). See Attachment 12.

In many instances, States' rules packages contained nuisance provisions, but EPA correctly identified them as not being related to the attainment or maintenance of the NAAQS and explicitly took no action on those provisions. For example, in a 1995 final rule regarding revisions to the Virginia SIP, EPA correctly acknowledged the existence of the States' odor and nuisance provisions and explicitly noted that such provisions would not be made a part of the SIP: "Note: (1) [a]ll Sections within each rule pertaining to the control of odors and noncriteria pollutants are not part of the SIP."[28] See Attachment 13. Also, in a 1995 direct final rule on Washington State's SIP, EPA took no action on odor provisions stating: "these provisions are not related to the criteria pollutants regulated under the SIP".[29] See Attachment 14.

Even when a State submitted the odor or other nuisance provisions as an integrated portion of the SIP submittal, EPA recognized that the Agency had no authority to include such regulations in the SIP. As previously noted, in a 1982 final rulemaking on the Iowa SIP, EPA acknowledged that Iowa had included rules regarding "odorous substances" and "odor complaints and violations". In response EPA wrote: "[t]hese revisions deal with the control of odor for which EPA has not adopted standards and does not require control. These revisions are unavoidably included with the SIP revisions but are not submitted by the state as part of the State plan and EPA does not take any action on them".[30] See Attachment 6. EPA took a similar position in 1981 when it refused to approve an odor provision as part of Guam's SIP.[31] See Attachment 15. Similarly, in 1981, EPA refused to adopt an odor provision in the Nevada SIP.[32] See Attachment 16.

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[26]58 Fed. Reg. 28359 (May 13, 1993).

[27]60 Fed. Reg. 36715 (July 18, 1995).

[28]58 Fed. Reg. 11374 (February 25, 1993).

[29]60 Fed. Reg. 21703 (May 3, 1995).

[30]47 Fed. Reg. 22531 (May 25, 1982).

[31]46 Fed. Reg. 26303 (May 12, 1981).

[32]46 Fed. Reg. 43141 (May 27, 1981).

These examples of EPA final rulemakings all demonstrate that EPA consistently has recognized that the CAA does not require, nor even provide authority for, the regulation of odors or other nuisances.

D. A Federal District Court, The Michigan Attorney General's Office, And The MDEQ All Have Concluded That Rule 901 Is Not Part Of The SIP

1. The United States District Court For The Eastern District Of Michigan Recently Held That Rule 901 Is Not Part Of Michigan's SIP

In the recent Van Buren Tp. case, Judge Hackett of the U.S. District Court for the Eastern District of Michigan held that Rule 901 was not a part of Michigan's SIP. As stated by the Court, "[t]here is no dispute that Rule 901 was submitted to the EPA. The issue is whether the EPA formally approved Rule 901." Van Buren Tp. at 13. The Court went on to state that "EPA approval requires Federal Register notice and the opportunity to submit comments." Van Buren Tp. at 14. The Court then acknowledged that EPA never published Rule 901 in the Federal Register. Citing a litany of MDEQ, Air Quality Division (AQD) internal documents, AQD correspondence, EPA correspondence, and numerous Federal Register notices, the Court, in deference to the oft-repeated opinions of the EPA and MDEQ, concluded that Rule 901 was not part of the Michigan SIP.

2. Michigan's Attorney General's Office Has Concluded That Rule 901 Is Not In The Michigan SIP

The holding in Van Buren Tp. is consistent with Michigan's law as interpreted by the Michigan Department of Attorney General. In fact, the Attorney General's Office concluded in 1986 that Rule 901 was not in the SIP. In a Memorandum of Law dated July 16, 1986, submitted to the U.S. District Court, the Eastern District of Michigan, in the case of U.S. v. Monitor Sugar, the Michigan Attorney General's Office stated: "MAPCC Rule 336.1901, while essentially repeating the prohibitions of Rule 336.46, is not part of Michigan's federally enforceable SIP" (emphasis added).[33] See Attachment 17.

3. The MDEQ Has Affirmatively Stated Rule 901 Is Not Part Of The Michigan SIP

As noted by Judge Hackett in the Van Buren Tp case, the MDEQ has long held the view that Rule 901 is not part of the Michigan SIP. Opinion at 13-16. The Court cited a number of MDEQ documents to that effect, including a "Rule History" of the Michigan SIP, an unofficial chart comparing Michigan's rules to the federal SIP-approved rules, a February 23, 1996, letter

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[33]Memorandum of Law, U.S. v. Monitor Sugar Company, No. 85-CV-10309-BC, July 16, 1986 U.S. Dist. Court, Eastern District of Michigan. The Attorney General's Office stated that Rule 46 may be in Michigan's SIP, but this is unlikely for the reasons stated infra. As noted by the State of Michigan during the 1980 rulemaking, Rule 46 is a constitutionally flawed and, consequently, unenforceable rule.

from Dennis Drake, Chief of the MDEQ, Air Quality Division, to David Kee, and a January 25, 1995 letter from Robert Irvine to an attorney with the law firm of Howard and Howard. In his correspondence, Chief Drake made clear that, in the MDEQ's view, "EPA has never taken action on [Rule 901]." See Attachment 18. Mr. Irvine, moreover, stated unequivocally in his response letter that Rule 901 is not part of the Michigan SIP for three fundamental reasons:

> "One, we have to date been unable to find any EPA notice of rulemaking on Rule 901 specifying it as being in the SIP. Two, EPA has been unable to find such documentation and has told us to consider it not part of the SIP. Third, staff of the AQD have publicly stated that Rule 901 is not part of the SIP because the rule covers nuisance odors and injurious effects which EPA traditionally has not been concerned about enforcing and which may not involve emission reductions impacting the SIP.

See Attachment 19.

The historical, and often-stated view of the MDEQ regarding Rule 901 is entitled to considerable deference. Van Buren Tp, at 19. This is particularly true given that the MDEQ drafted Rule 901, and is the primary enforcer of the Rule.

E. Even If Rule 901 Were Part Of The Michigan SIP, EPA Lacks Legal Authority To Regulate Odors Under The CAA

Three prominent cases discuss the regulation of odors under the CAA. These cases are Concerned Citizens of Bridesburg v. EPA, 836 F.2d 777 (3rd Cir., 1987); Save Our Health Organization v. Recomp of Minnesota, Inc., 37 F.3d 1334 (8th Cir., 1994); and Cate v. Transcontinental Gas Pipeline Corp., 904 F. Supp. 526 (W.D. Va. 1995).

Several significant observations are in order when reviewing these cases. First, EPA was not a plaintiff seeking to enforce an odor regulation in any of the cases. Rather, the Agency's view cited consistently in each case is that odors are not regulated under the CAA. In fact, in Bridesburg, EPA argued it could rescind certain odor regulations inadvertently approved as part of the Pennsylvania SIP because these rules had no connection to the achievement of any NAAQS. Second, in the Cate and Recomp cases, the citizen suit plaintiffs failed in their bids to enforce odor regulations under the CAA. Third, and most importantly, in Bridesburg and Recomp, the courts declined to rule on the substantive claim that EPA lacked statutory authority to approve odor regulations as part of any SIP, and decided each case on alternative grounds. See Bridesburg, 836 F.2d at 779; and Recomp, 37 F.3d at 1336, n3.

EPA Region V may be relying on the Bridesburg case to argue that it inadvertently approved an odor regulation as part of the Michigan SIP and, consequently, the Agency may enforce this provision under the CAA. However, this argument is without legal or factual

substance. First, as discussed above, a review of the applicable administrative record confirms that EPA never approved Rule 901 as part of the Michigan SIP. A claim that the Rule was inadvertently approved, therefore, is without merit.

Second, odor is not a criteria pollutant regulated under the CAA, and odor regulations cannot be legitimately included in any SIP. EPA repeatedly has articulated its view that odors are not regulated under the CAA. Recently, in September, 1996, the Agency removed an odor control regulation inadvertently approved as part of the Wyoming SIP because the rule did not have "a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act." 61 Fed. Reg. 47058 (September 6, 1996). Additionally, in June, 1996, EPA struck an odor rule from the Puerto Rican SIP noting that "it is EPA policy that no odor regulations be included in SIPs because there is no NAAQS specifically for odor." 61 Fed. Reg. 31885, 31887 (June 21, 1996) (emphasis added). Also, in May, 1996, in response to a comment on an Ohio SIP redesignation request, EPA stated that "the Clean Air Act (CAA) does not provide specific requirements for companies to control odors. Odor is not an issue pertinent to the ozone standard or the attainment of that standard." 61 Fed. Reg. 20458, 20462 (May 7, 1996) (emphasis added).

In May, 1995, EPA removed certain odor regulations from the Minnesota SIP agreeing with Minnesota that "these regulations were not intended for purposes of achieving air quality standards or other Clean Air Act purposes and remain unnecessary for such purposes." 60 Fed. Reg. 27411 (May 24, 1995). Similarly, in August, 1994, EPA refused to approve the State of Washington's odor regulations for inclusion in the Washington SIP. 59 Fed. Reg. 44324, 44326 (August 29, 1994). Moreover, in January, 1994, EPA declined to take action on Montana's odor regulations asserting "[t]hese odor provisions do not have a reasonable connection to the NAAQS-related air quality goals of the Clean Air Act." 59 Fed. Reg. 2537, 2539 (January 18, 1994).

Finally, EPA has frequently expressed the view that state odor regulations, like Rule 901, are not covered by, and do not further the goals of, the CAA. In its implementation of the 1970 CAA, EPA made clear it had no intention of listing odors as a criteria pollutant. See Air Program Strategy for Attainment and Maintenance of Ambient Air Quality Standards and Control of Other Pollutants, EPA 1977. As part of the 1977 Amendments to the Act, Congress directed EPA to revisit this issue and to study the health affects of odors and the feasibility of regulating odors under the CAA. In a February 1980 report to Congress, EPA recommended against the regulation of odors under the CAA. In so doing, the Agency reasoned, in part, that, "since odor perception is quite subjective, nuisance law, initiated by citizen complaints, appears to be an appropriate mechanism for dealing with odor problems." See Attachment 20 Regulatory Options for the Control of Odors, p. 2 (February 1980) (emphasis added). EPA evaluated and rejected the feasibility of NAAQS, new source performance standards ("NSPS"), and national emission standards for hazardous air pollutants ("NESHAPs") for odors. The conclusions of the report are compelling.

IV. BASIC CONCEPTS OF FAIR NOTICE AND DUE PROCESS PROHIBIT THE FEDERAL ENFORCEABILITY OF RULE 901

EPA's recent attempts at enforcement of Rule 901 and its assertions that Rule 901 is in the SIP, are completely contrary to the position the Agency has taken since the State's 1980 SIP submittal. Indeed, any position by EPA that Rule 901 is federally enforceable constitutes essentially a new rule. Basic concepts of fair notice and due process require such a substantive new rule undergo notice and opportunity for comment. Without such notice, federal administrative law would preclude EPA from implementing this "new rule."

Specifically, the courts have been clear that an agency "must always provide 'fair notice' of its regulatory interpretation to the regulated public . . ." General Electric v. EPA, 311 U.S. App. D.C. 360, 53 F.3d 1324 (May 12, 1995) (court vacated the District Court's finding of liability against General Electric for alleged TSCA violations and set aside the fine on the grounds that the regulation did not provide General Electric with fair notice of the Agency's interpretation.) The General Electric court went on to state: ". . . we must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." General Electric, 53 F.3d at 1329.

In the case of Rule 901, the Rule was never once mentioned or cited in any Federal Register notice. Moreover, Rule 901 is not mentioned anywhere under Michigan's SIP provision as listed in 40 C.F.R. § 52. Thus, a party reviewing the Federal Register and the C.F.R. would not have any way of knowing that EPA now considers Rule 901 to be part of the State's SIP.

In addressing the fair notice standard, a District Court stated "[p]articularly compelling evidence that fair notice of a rule has not been given exists where the agency itself has not provided a definitive or consistent reading of the regulation." See, *e.g.*, General Electric Co., 53 F.3d at 1332; see also Diamond Roofing Co., 528 F.2d at 649. When the "agency itself is uncertain of the meaning of the regulation" and "agency personnel given conflicting advice to private parties about how to comply with it," it is "arbitrary to find the regulation 'clear.'" Rollins Envtl. Services v. EPA, 290 U.S. App. D.C. 331, 937 F.2d 649, 653 (D.C. Cir. 1991)." Accord U.S. v. Hoechst Celanese, 964 F. Supp. 967 (May 10, 1996); 128 F.3d 216, affirmed in part, rev. and remanded in part (4th Cir. 1997).

Until recently, both EPA and MDEQ have consistently and publicly stated that Rule 901 is not a part of the Michigan SIP. The first time EPA Region V apparently suggested Rule 901 is federally enforceable was when it revised its Internet home page in August, 1997. Placement on the home page, however, falls far short of the fair notice and due process standards cited by

the above-referenced federal district courts. In fact, in the Van Buren Tp. case, Judge Hackett explicitly rejected the notion that a recent change to the EPA Region V home page was legally sufficient to overcome prior articulated EPA/MDEQ interpretations that Rule 901 is not a federally enforceable part of the Michigan SIP. Van Buren Tp. at 19, n. 1.

In short, a thorough reading of the preamble to the May 6, 1980 final rulemaking indicates that Rule 901 was neither approved nor disapproved as part of the Michigan SIP. Instead, no action was taken on Rule 901. EPA's internal memos and prior public assertions indicate that EPA recognized that it had no authority to regulate nuisances under the SIP. Regulated parties have had fair notice that Rule 901 is not in the SIP and is not federally enforceable. Regulated parties have not had "fair notice" of EPA's apparent new position that Rule 901 is suddenly federally enforceable. Such a dramatic change in interpretation represents a new rule for which EPA must follow the necessary procedural steps in order to meet the basic requirements of due process. This conclusion is supported extensively in case law.

V. CONCLUSION.

Michigan's Rule 901 has never been approved as part of the Michigan SIP. Approving a nuisance rule would exceed EPA's scope of authority under the CAA. Even EPA has consistently and repeatedly asserted that it lacks authority to adopt nuisance or odor provisions. It has only been recently that EPA Region V has begun to assert that Rule 901 is in the SIP. EPA's change of position violates fundamental concepts of fair notice and due process. Indeed, Rule 901 has never even been mentioned or cited in a Federal Register notice as a federally enforceable standard. The view that Rule 901 is not part of the Michigan SIP was recently upheld by the Federal District Court for the Eastern District of Michigan in the Van Buren Tp. case. Accordingly, Rule 901 is not federally enforceable under the CAA.

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